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In The

Supreme Court of the United States

October Term, 1997

THORNTON ELLIOTT, EUGENE McQUEEN, VERNON JOHNSON, MICHAEL CHOICE, FAMIOUS FRENCH, MARCUS LYONS, DARRYL LANE, RONNIE NELLON, CHARLES J. BEYER, JACKIE SMITH, SAUL LOCKETT, ZEKE RAND, LEO JOHNSON, LAWRENCE RAND, ROBERT JOHNSON, LOUIS DAVIS, ANTOINETTE JOHNSON and HUBERT WEBB,

Petitioners,

vs.

THE UNITED CENTER, A JOINT VENTURE f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The United Center, is a joint venture and has no parent company and no nonwholly owned subsidiaries.

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I

INTRODUCTION

Eighteen street peddlers in Chicago (the "Peanut Vendors") contend there is a relevant market under antitrust law for the sale of snack food "in and around" the Chicago United Center, home arena of the Chicago Bulls professional basketball and Chicago Blackhawks professional hockey teams. The Peanut Vendors contend the United Center is monopolizing this market illegally by prohibiting spectators from bringing food with them into the stadium. A trial court held there was no such market as a matter of law, denied injunctive relief without an evidentiary hearing, and dismissed the Peanut Vendors' complaint. An appellate court agreed. The Peanut Vendors claim these lower courts conflict with the United States Supreme Court's own rulings in various seminal antitrust law decisions.

After raising and then abandoning various theories in the courts below, the Peanut Vendors now contend the United Center's policy prohibiting spectators from bringing food with them into the facility constitutes illegal tying or monopoly leveraging. Because of this ban on outside food, purportedly sports fans attending Bulls and Blackhawks games at the United Center are "forced" to buy snack food from the United Center's food concessionaires, who operate exclusively inside the arena, rather than from the Peanut Vendors, who install themselves on the streets leading up to the stadium gates.

(The Peanut Vendors presume that Bulls and Blackhawks fans cannot sit through a game without submitting to a craving for snack food. Hence the Peanut Vendors contend the United Center is "forcing" spectators to buy snack food from stadium concessionaires. The Peanut Vendors also suggest, without clearly arguing so, that sports fans have a need — and a right — in particular to eat peanuts while watching Bulls and Blackhawks games. The Peanut Vendors emphasize that the United Center food concessionaires do not include peanuts among the snack foods

they offer. The Peanut Vendors apparently believe that, especially because the United Center food concessionaires will not satisfy the sports fans' need for peanuts, the Peanut Vendors must be allowed to do so.)

The Peanut Vendors now contend they should have been given an evidentiary hearing in the trial court to prove that presentation of live Bulls and Blackhawks games in Chicago constitutes a stand-alone relevant market that is being monopolized by the United Center. Neither the trial court, however, nor the appellate court, nor the United Center have ever disputed this issue.

What the lower courts have rejected is the Peanut Vendors' apparent reasoning that, if Bulls and Blackhawks games are unique "products" for which sports fans of these teams will recognize no reasonable substitutes, then sale of snack food to Bulls and Blackhawks fans while they are attending these games also must be a unique "product" that constitutes a stand-alone relevant market separate from the sale of snack food anywhere else in Chicago where street peddlers or other snack food purveyors may wish to operate. The Peanut Vendors allege that they can and do sell peanuts on the streets all over Chicago, including on the streets outside various sports arenas. However, the Peanut Vendors assume that the particular streets outside the United Center, when those streets are filled with Bulls and Blackhawks fans, constitute a unique relevant market where the Peanut Vendors must be allowed to "compete" with food concessionaires inside the stadium for sale of snack food to sports fans about to enter the facility.

Although the Peanut Vendors have never clearly stated this as their ultimate theory, nevertheless the lower courts anticipated and rejected this contention. In the words of the appellate court:

> [P]eople do not go to the United Center to buy food. . . . No one argues that the United Center is

> monopolizing the market for snack food in near west Chicago [the location of the United Center], because such an argument would be ludicrous on its face. The United Center is obviously not monopolizing the market for peanuts: it is staying strictly out of the peanut business. True, its ban means that those with a craving for peanuts must satisfy it either before or after the game, but both price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Center's policies. (Petitioners' Appendix A, p. 5a.)

The Peanut Vendors claim this reasoning conflicts with various pronouncements of this Court. However, the Peanut Vendors isolate statements from this Court's decisions without acknowledging the full context of the cases they cite. Viewed in their proper context, none of this Court's cited decisions contradict the lower court rulings.

REASONS FOR DENYING THE WRIT

I.

BROWN SHOE

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court considered how the market for shoe manufacture and sale must be analyzed. Brown Shoe Co. and Kinney Shoe Co. wanted to merge. The government opposed their merger because these two companies controlled a substantial share of all shoe sales in the country. Brown Shoe Co. contended, however, that if the shoe market were divided into appropriate submarkets, Brown and Kinney would be seen as occupying different submarkets.

Brown Shoe Co. contended the market must be seen to consist of a large number of submarkets, distinguishing not only between men's and women's shoes, children's and adult's shoes, but also between expensive and moderate priced shoes, high and low quality shoes, and as to children, between infant's shoes and older children's shoes, boy's shoes and girl's shoes. This Court rejected Brown Shoe's argument for a myriad of submarkets. The Court examined various practical indicia of how the shoe market operates, and concluded that the market should be divided into only three submarkets: men's, women's and children's shoes. *Id.* at 325-26.

The practical indicia this Court recognized were: industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Id.* at 325.

The Peanut Vendors contend they have satisfied these criteria as to the existence of a submarket for food concessions at the United Center simply by alleging that, in the years before the United Center opened its doors in 1994, the Chicago Stadium, the prior home arena for the Bulls and Blackhawks, did not enforce a ban on outside food and accordingly there were peanut vendors operating on the streets outside the stadium, thus giving pubic recognition to a market for food concession sales "in andaround" the stadium. (Petitioners' Brief, pp. 13–14.)

However, with such an easily-satisfied definition, every individual business enterprise would qualify as a relevant submarket for antitrust purposes merely by continuing in existence for some period of time. Certainly in the shoe manufacturing industry, history would support the fact that there have always been shoes of various price and quality, and shoes for young boys as opposed to young girls. Yet this Court did

not conclude that the mere history of such a distinction by itself sufficed to define a relevant submarket.

Applying the *Brown Shoe* criteria to the present case, the issue must be whether the sale of snack food specifically to Bulls and Blackhawks fans must be recognized as a separate market from sale of snack food to anyone else. In that context, the appellate court correctly concluded: "People do not go to the United Center to buy food." In other words, there is no public perception that the consumption of snack food at the United Center is somehow distinct and separate from the consumption of snack food anywhere else.

Analyzing the consumption of snack food at the United Center under the *Brown Shoe* practical indicia demonstrates: (a) there are no unique production facilities required to manufacture snack food for sale at the United Center as compared with snack food sold anywhere else; (b) snack food consumption is not particular only to events held at the United Center, but is similar if not exactly the same as snack food consumption at all other professional sports stadiums, and indeed similar to snack food consumption at any entertainment facility, if not also snack food consumption anywhere, whether at work, home, school, or wherever; (c) there is nothing in particular about the customers who purchase snack food at the United Center that would distinguish them from snack food purchasers at any other professional sports facility, or indeed that would distinguish snack food consumers at the United Center from snack food consumers anywhere else in the world; and (d) there are no special selling mechanisms in place in the streets outside the United Center which are not in place at virtually every location where street peddlers or other snack food vendors may wish to operate. Indeed, the Peanut Vendors allege that street vendors sell peanuts outside every major sports facility in the country, and the Peanut Vendors themselves operate on streets throughout Chicago, including at various sports arenas other than the United Center.

Hence nothing in *Brown Shoe* contradicts the lower court decisions rejecting the notion that snack food sale at the United Center is a stand-alone relevant market.

II.

EASTMAN KODAK

In *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), this Court concluded that an evidentiary hearing would be necessary to understand whether purchasers of complex photocopying machines are able to appreciate the full life cycle cost of their purchase when choosing between a copier where the manufacturer is the only source of supply not only for the finished product but also for replacement parts and service, as opposed to a copier where the purchaser can obtain parts and service from sources independent of the manufacturer. *Id.* at 469-79.

Kodak argued that parts and service were not separate relevant markets from sale of the copying machine itself, because purchasers could appreciate the comparative price advantages of purchasing a machine that included parts and service exclusively from the manufacturer, compared with purchasing a machine where parts and service are available from an independent supplier. Therefore Kodak contended it could not illegally monopolize a market for servicing its own machines, where it was refusing to provide replacement parts to independent service companies. A trial court granted Kodak's summary judgment motion based only on affidavits from Kodak as to how this interaction of product, parts, and service affected the consumer's buying decision and the ultimate cost of the purchase.

This Court reversed the grant of summary judgment, concluding that because of the complexity of facts and issues

involved: "The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Id.* at 482.

The Peanut Vendors now contend that *Eastman Kodak* prohibits a trial court from dismissing any claim of antitrust violation without first giving the plaintiff an evidentiary hearing to establish the existence of a relevant market. (Petitioners' Brief, pp. 7, 15-16.) However, the Peanut Vendors make no attempt to demonstrate what it is about the concept of snack food consumption at Bulls and Blackhawks games that would require an evidentiary hearing in order to comprehend whether snack food consumption at the United Center is a stand-alone relevant market. Unlike *Eastman Kodak*, the Peanut Vendors offer no analysis of why the "commercial realities" might require a court to regard snack food consumption at the United Center either as a separate product from the sports event for which the consumer buys a ticket, or as a separate product from snack food sold to that consumer anywhere or anytime other than at a Bulls or Blackhawks game.

The Peanut Vendors acknowledge that the United Center has never allowed ticket-buyers to bring food with them into the arena since it opened its doors in 1994. (Petitioners' Brief, p. 2.) Hence unlike the situation in *Eastman Kodak*, Bulls and Blackhawks fans attending games at the United Center are not misled into buying tickets for these games under the mistaken belief that they could bring their own snack food with them to the facility and thus avoid having to pay higher prices for snack food bought from stadium concessionaires.

Moreover, in *Eastman Kodak* this Court recognized that the life cycle cost of a durable good such as a complex photocopying machine inevitably must include replacement parts and service. But the Peanut Vendors show no reason why the cost of attending a Bulls or Blackhawks game inevitably

must include the price of snack food. Again as the appellate court noted, people do not come to the United Center to buy food. Snacking is not a necessary concomitant of sitting through a Bulls or Blackhawks game.

A court does not require an evidentiary hearing to comprehend these "commercial realities." Hence the decision of the lower courts to deny injunctive relief and dismiss the Peanut Vendors' complaint on the pleadings does not violate any principle of *Eastman Kodak*.

III.

JEFFERSON PARISH

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), this Court concluded that a hospital that controlled only thirty per cent of the market for surgical services in New Orleans did not violate antitrust law by hiring its own anesthesiologists and permitting only these persons to provide anesthesiological services in its facility. The plaintiff was an independent anesthesiologist who contended that the hospital's exclusive contract with a firm of anesthesiologists constituted an illegal tying agreement that harmed consumers by preventing them from selecting their own provider for such services when they elected to undergo surgery at this hospital.

The Peanut Vendors contend the *Jefferson Parish* decision rejects a concept, the "one-monopoly-profit theory," on which the appellate court in the present case purportedly based its decision. (Petitioners' Brief, pp. 20-21.) However, the supposedly errant reasoning of the appellate court in fact parallels the reasoning of *Jefferson Parish*. The appellate court reasoned that the United Center does not have market power in the snack food market and therefore cannot harm consumer welfare by

virtue of its refusal to allow patrons to bring food with them into the facility. As to how the United Center goes about extracting a profit from its monopoly over Bulls and Blackhawks games, the appellate court stated:

> The United Center can recoup the cost of putting on the event in any of a number of ways. It can charge very high ticket prices, and allow unlimited numbers of food concessions in and around the stadium, or it can charge somewhat lower ticket prices and restrict the number of concessions (thereby earning some of its profits from food sales). (Petitioners' Appendix A, p. 5a.)

The appellate court noted that such a shifting of profit acquisition from ticket prices to food concession prices was not prohibited by antitrust law. This was so because there was no prospect that by looking to a captive food concession operation to generate some of its profit the United Center was threatening the ability of snack food purveyors to compete generally in the Chicago market for sale of snack foods. In the words of the appellate court, as noted in the introduction to this brief:

> No one argues that the United Center is monopolizing the market for snack food in near west Chicago, because such an argument would be ludicrous on its face. The United Center is obviously not monopolizing the market for peanuts: it is staying strictly out of the peanut business. True, its ban means that those with a craving for peanuts must satisfy it either before or after the game, but both price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Center's policies. (Petitioners' Appendix A, p. 5a.)

The appellate court's analysis in the present case parallels this Court's reasoning in *Jefferson Parish*. In a concurring opinion in *Jefferson Parish*, Justice O'Connor reasoned:

> The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying-product market, it makes no difference to him or his customers whether he exploits that power by raising the price of the tying product or by "forcing" customers to buy a tied product.

466 U.S. at 41-42.

Hence a tying agreement is not illegal if the seller has significant market power only in the tying product, but not also in the tied product. Justice O'Connor considered that where Jefferson Parish Hospital controlled thirty per cent of the market for surgical services in New Orleans, the hospital "*may* thus gain local market power in the provision of anesthesiology" by virtue of its exclusive dealing contract. *Id.* at 42 (emphasis added). However, Justice O'Connor concluded that it did not require a "detailed analysis of the size of the relevant markets" to determine that an exclusive dealing agreement between a "firm of four anesthesiologists and one relatively small hospital" did not threaten an unreasonable restraint on trade either as to the availability of anesthesiological services at other hospitals in the area or the range of employment options that other anesthesiologists might enjoy in the community. *Id.* at 45-46. *See also, main opinion, id.*, at 29-30.

Similarly in the present case, it does not require a detailed analysis of the snack food market in Chicago to conclude that the United Center's ban on outside food does not threaten either the ability of consumers to purchase snack foods elsewhere than at the United Center, nor does the United Center's policy prevent street vendors from pursuing their livelihood selling peanuts on the streets of Chicago. Indeed, the Peanut Vendors allege that they can and do sell peanuts on those streets, including at sports arenas other than the United Center, notwithstanding the United Center's ban on outside food.

Hence the decision of the appellate court does not conflict with this Court's ruling in *Jefferson Parish* as to how the court must analyze the United Center's method of extracting a profit from its presentation of Bulls and Blackhawks games.

CONCLUSION

Antitrust law does not require the United Center to facilitate the Peanut Vendors' business merely because these eighteen peddlers wish to install themselves on the streets outside the United Center at the time when those streets are crowded with persons going into the stadium. Significantly, and correctly, the Peanut Vendors do not argue the right to come inside the United Center to sell their wares. Nor does antitrust law give the Peanut Vendors such a right by proxy, by dictating to the United Center that it must allow its patrons to bring in with them whatever food and beverages the spectators may wish to bring — or that street peddlers such as the Peanut Vendors may wish to sell.

For the foregoing reasons, the United Center respectfully requests that this Honorable Court deny the Peanut Vendors' petition for a writ of certiorari.

Respectfully submitted,

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